UNITED NATIONS

GENERAL

ASSEMBLY

Distr.
GENERAL

A/CN.9/SR.509
2 August 1993

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 509th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 14 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

CONTENTS

New international economic order: procurement (continued)

Consideration of draft Model Law on Procurement (continued)

Articles 11 bis

Consideration of draft Guide to Enactment

Introduction to the draft Guide and commentary on the Preamble

Commentaries on articles 1-8

Commentary on article 9

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of distribution of this document to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

V.93 87988 5834E

/...

Distr.: 6 August 1993

The meeting was called to order at 2.05 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add. 1 and 2, A/CN.9/377, A/CN.9/378 and Add.1, A/CN.9/XXVI/CRP.5)

Consideration of draft Model Law on Procurement (continued)

Article 11 bis

1. The CHAIRMAN invited the United States delegation to introduce its proposal.

2. Mr. WALLACE (United States of America), recalling the brief discussion on article 32 at the end of the previous meeting, submitted the following proposal for an article 11 bis: "Public notice of procurement contract awards. The procuring entity shall in all procurement proceedings publish notice of any procurement contract, promptly after its entry into force, in a manner to be provided for in the procurement regulations."

3. Ms. ZHANG Yuejiao (China) said that she could go along with the proposal made by the United States representative, although she preferred the proposal made by the representative of Canada at the end of the previous meeting.

4. Mr. JAMES (United Kingdom) said that the Model Law should not place an obligation on the procuring entity to publish notice of procurement contracts of low value. Notice of most contracts should be published, but contracts of a value below a certain monetary amount, which would have to be fixed in relation to the economy of the enacting State, should not have to be publicized.

5. Mr. LEVY (Canada), expressing support for the comments of the United Kingdom representative, said that the proposal made by the Canadian delegation at the end of the previous meeting contained the same pitfall as the proposal of the United States representative - namely, it was mandatory in all cases; his delegation had not intended that. The regulations should provide guidance as to the manner and extent of the publicizing of procurement contract awards, and there should be a cut-off point below which publicizing was not mandatory.

6. He proposed the following wording: "The procurement regulations shall specify in what instances and in what manner notice of a procurement contract shall be published by the procuring entity".

7. Mr. WALLACE (United States of America) suggested the following revised wording: "The procuring entity shall promptly publish notice of procurement contract awards, in the manner and to the extent provided for in the procurement regulations".

8. Mr. SAHAYDACHNY (Secretariat) advised caution as regards referring to procurement regulations; the Model Law was not based on the assumption that such regulations would be issued.

9. Mr. PHUA (Singapore) suggested that the revised wording suggested by the United States representative be paragraph (1) of article 11 bis, followed by a paragraph (2) reading as follows: "Paragraph (1) shall not apply to procurement contracts below the value of ...". The appropriate figure could be inserted by the enacting State.

10. Mr. PRIESTLEY (Observer for Australia) urged the Commission to make the provision mandatory and proposed the following wording: "The procuring entity shall promptly publish notice of all procurement contract awards".

11. If it was felt that such a provision would give rise to undue expense in the case of small procurement contracts, perhaps official gazettes could be used as the normal place of publication of notices.

12. Ms. PIAGGI-VANOSSI (Argentina), supporting the proposal of the United States representative, agreed with the observer for Australia regarding the use of official gazettes.

13. Mr. GRIFFITH (Observer for Australia) said that his delegation could go along with the suggestion of the Singapore representative, except that, in its view, the provision in paragraph (2) should be optional - "Paragraph (2) need not apply ...".

14. With regard to paragraph (1), he suggested the following wording: "The procuring entity shall promptly publish notice of procurement contract awards. Regulations may make provision for advertising".

15. Mr. SAHAYDACHNY (Secretariat) said there appeared to be a wish that paragraph (1) of article 11 bis should state the rule that awards of procurement contracts would be publicized in the official gazettes of enacting States and that the rule should be subject to paragraph (2), which would state that procurement regulations might set a monetary value below which the publication requirement would not apply.

16. Regarding the idea that the provision in paragraph (2) should be optional, he pointed out that the entire Model Law was, in a sense, optional.

17. Mr. GRIFFITH (Observer for Australia) said his delegation understood the wording favoured at present to be on the following lines:

> "(1) The procuring entity shall promptly publish notice of procurement contract awards. Regulations may be made providing for publication.
>
> (2) Paragraph (1) shall not apply to procurement contract awards below the value of ..."

18. The Guide to Enactment could mention the possibility of using official gazettes in cases where countries had them.

19. Mr. JAMES (United Kingdom) suggested that paragraph (2) be modified to read as follows: "Paragraph (1) shall not apply to procurement contract awards below the value specified in the procurement regulations". The provision would thus be optional, since it would depend on whether a State issued procurement regulations.

20. Mr. LEVY (Canada) said that, in the light of what had just been said by the representatives of Australia and the United Kingdom, he would propose wording on the following lines:

"(1) Procuring entities shall promptly publish notice of procurement contract awards.

(2) Regulations may be issued providing for the manner in which and the extent to which such notice shall be published.

(3) Paragraph (1) shall not apply to procurement contracts below a certain value specified in the procurement regulations."

21. The CHAIRMAN asked whether the Commission could accept the wording of article 11 bis proposed by the representative of Canada.

22. It was so decided.

23. The CHAIRMAN said that the Commission had completed its consideration of the draft Model Law, and he invited the Commission to proceed with consideration of the draft Guide to Enactment.

Consideration of draft Guide to Enactment (A/CN.9/375)

24. Mr. WALLACE (United States of America), referring to the note by the Secretariat on the procurement of services (document A/CN.9/378/Add.1), asked whether the Commission would be able to deal with that aspect of its possible future work during its current session. He also asked whether the Commission would be discussing the possibility of the Secretariat's preparing a short paper on electronic data interchange (EDI) in procurement.

25. The CHAIRMAN said he hoped there would be an opportunity for the Commission to consider both matters before the end of the session, in the context of its future work.

26. Ms. ZIMMERMAN (Canada) asked whether the Commission would consider the report of the drafting group before or after the draft Guide to Enactment.

27. The CHAIRMAN said that the drafting group would complete its report soon, but he felt that the Commission should meanwhile consider the draft Guide to Enactment.

28. Mr. MORAN BOVIO (Spain) suggested that comments on purely linguistic matters be submitted directly to the Secretariat.

29. The CHAIRMAN agreed.

30. Mr. WALLACE (United States of America) recalled that, on many occasions in the course of its consideration of the Model Law, the Commission had agreed that certain points should be reflected in the Guide to Enactment. That raised the question of how to proceed with the draft Guide, which the Commission wished to approve during its current session.

31. Mr. LEVY (Canada) suggested that the Commission deal first with the report of the drafting group, turning to the draft Guide whenever it had completed a section of the report.

32. The CHAIRMAN said he would prefer it if the Commission began with the draft Guide.

33. Mr. GRIFFITH (Observer for Australia), agreeing with the representative of Canada, said that one section of the drafting group's report was already available (document A/CN.9/XXVI/CRP.4) and could be studied by delegations before the next meeting. It would then be possible to decide how much time should be devoted to consideration of the draft Guide.

34. The CHAIRMAN urged the Commission to take up the draft Guide, beginning with the Introduction.

Introduction to the draft Guide and commentary on the Preamble

35. Mr. KOMAROV (Russian Federation), commenting on paragraph 11 (Procurement methods in the Model Law), recalled that the Commission had adopted an article 15 bis, making restricted tendering a method of procurement. That should be reflected in the second part of paragraph 11 of the Introduction, or somewhere else in the draft Guide.

36. Mr. SAHAYDACHNY (Secretariat) said that the Secretariat would reflect in the draft Guide all changes made by the Commission to the Model Law.

37. Mr. FRIES (United States of America), referring to paragraphs 12-16 of the Introduction (Administration of procurement), said that greater emphasis should be placed on the key role of public administrative bodies in implementing procurement legislation and on the need to equip them to do so.

38. Mr. GRIFFITH (Observer for Australia) agreed with the United States representative.

39. Paragraphs 17 and 18 of the Introduction (Procurement of services) should be brought up to date in the light of the Commission's decision to deal with the procurement of services on another occasion.

40. Also, greater emphasis should be placed in the Guide to Enactment on the basic philosophy underlying the Model Law, especially as regards the need for transparency and honesty on the part of public administrations. Perhaps the Commission could give the Bureau instructions to that effect.

41. Mr. WALLACE (United States of America), suggesting deletion of the last sentence of paragraph 18, said that a question yet to be settled by the Commission was the extent to which procuring entities should take price into account when awarding contracts for services.

42. Reverting to matters of procedure, he said he was reluctant to entrust to the Secretariat the task of reflecting in the Guide to Enactment the conclusions reached by the Commission in all their nuances.

43. The CHAIRMAN said it was for the Commission to instruct the Secretariat as to what the draft Guide should contain.

44. Mr. GRIFFITH (Observer for Australia) said he was confident that the Bureau was capable of reflecting the conclusions of the Commission in the Guide to Enactment. However, time was now too short for the Commission to go through the entire text of the draft Guide.

45. Perhaps the Commission could go through the draft Guide as far as possible and then entrust to the Bureau the task of preparing a new draft - to be circulated for comments which should be submitted within, say, 90 days.

46. At all events, the Commission should avoid having to return to the item at its next session.

47. Mr. LEVY (Canada), endorsing that approach, said that the United States representative was perhaps being unduly pessimistic about the Secretariat's ability to reflect in the Guide the conclusions reached by the Commission.

48. Mr. WALLACE (United States of America) said that the Guide to Enactment was an extremely important document and that the Commission should give it the attention which it deserved.

49. A practical - but by no means ideal - approach might be one along the lines suggested by the observer for Australia: the Commission could adopt the draft Guide provisionally; the Secretariat would revise it in the light of relevant reports of the Working Group and the comments made during the present session; the revised draft would be circulated to members of the Commission for early comment; and the Secretariat would produce the final text in the light of the comments received by it.

50. Ms. DODSWORTH (United Kingdom) said that no one underestimated the importance of the Guide to Enactment. In the time still available during the present session, however, the Commission could do no more than highlight key points, leaving the detailed drafting to the Secretariat. Any points missed could be taken up by Commission members when commenting on the revised draft.

51. Ms. ZIMMERMAN (Canada) asked whether the Commission had ever adopted a document provisionally, before it was actually completed.

52. Mr. HERRMANN (Secretary of the Commission) said that the only instance he could immediately recall concerned the Legal Guide on International Countertrade Transactions. There, however, the open questions had been merely terminological ones.

The meeting was suspended at 3.32 p.m. and resumed at 4.05 p.m.

53. The CHAIRMAN asked the representative of the United States of America to present a compromise approach agreed upon during the suspension of the meeting.

54. Mr. WALLACE (United States of America) said it had been agreed that: the Commission would discuss the draft Guide as fully as possible in the time still available; the Secretariat would then, within a reasonable time, prepare

(Mr. Wallace, United States of America)

a revised draft in the light of the Commission's deliberations and the changes made to the Model Law and in the light of various reports of the Commission and the Working Group; a revised draft would be sent to Commission members for comments which should be submitted within 30-40 days, and preparation of the final draft would be entrusted to the Secretariat.

55. The CHAIRMAN said that, as far as he could see, the only problem with that approach was that Commission members might submit conflicting comments.

56. Mr. PEREZNIETO CASTRO (Mexico) did not think that would be a problem; the Secretariat had enough experience to deal with conflicting comments.

57. Mr. GRIFFITH (Observer for Australia), agreeing with the representative of Mexico, said a problem might arise if the Secretariat received a comment calling for a major reformulation or for the incorporation of something not discussed in the Working Group or the Commission. But again, the Secretariat had enough experience to judge whether such a comment should be reflected in the Guide to Enactment.

58. Mr. MORAN BOVIO (Spain), warning against overburdening the Secretariat, said that the draft Guide to Enactment merely needed to be updated in the light of the discussions which had taken place and the decisions which had been reached during the Commission's present session.

59. The CHAIRMAN said that the Commission appeared to agree that the draft Guide to Enactment should be adopted provisionally pending the incorporation by the Secretariat of comments received from Member States within a specified period of time.

60. Mr. TUVAYANOND (Thailand) suggested that the Guide to Enactment be designated as a "commentary"; all the Secretariat would then have to do would be to update it.

61. Mr. MORAN BOVIO (Spain) expressed misgivings about the suggestion made by the representative of Thailand.

62. Mr. WALLACE (United States of America) said it was not clear to him whether the commentary which the representative of Thailand had in mind was the same thing as the commentary referred to in paragraph 5 of the Introduction to the report of the Working Group on its fifteenth session (document A/CN.9/371).

63. Mr. HERRMANN (Secretary of the Commission) said that with so many references having been made to provisional adoption of the Model Law and the Guide to Enactment, the Commission might usefully consider when final adoption should take place.

64. On the question of the Secretariat's future tasks, he said that the Working Group had earlier operated on an informal basis, without reports, and that the Secretariat might indeed have problems with conflicting comments on the draft Guide.

65. Mr. FRIES (United States of America) agreed that the Commission should give thought to the question of final adoption.

66. He imagined that most of the comments received on the revised draft would relate to drafting, only a few being of a substantive nature. Either way, they should reflect the discussions taking place during the present session and not raise controversial new issues.

67. Mr. TUVAYANOND (Thailand) said he was sure that the Secretariat had noted all comments and conclusions of relevance to the Guide to Enactment and that there would be no need for the Commission to wait until its next session before adopting it.

68. Mr. KOMAROV (Russian Federation), supporting what had been said by the representative of Thailand, said he would not like final adoption of the Model Law to be delayed by protracted work on the draft Guide. The Commission might use the same kind of working method as it had used in the preparation and adoption of the Legal Guide on International Countertrade Transactions.

69. The CHAIRMAN said that, if the Commission wished to approve the draft Guide subject to its reflecting the conclusions reached by the Commission at the present session, the Commission should go through the Guide in order to see whether anything had been overlooked.

70. It was so agreed.

71. The Introduction to the draft Guide and the commentary on the Preamble were approved.

Commentaries on articles 1-8

72. The commentaries on articles 1-8 were approved.

Commentary on article 9

73. Mr. PHUA (Singapore) said that the last sentence of paragraph 1 presupposed that domestic legislation already authorized the use of EDI in procurement. The text should make it clear that the use of EDI in procurement was subject to domestic legislation.

74. Mr. WALLACE (United States of America), referring to the comment made by the representative of Singapore, said that the text might state that article 9 had not been drafted as a general enabling provision for the use of EDI in procurement and that the Model Law at present contained no such general enabling provision.

75. Reverting again to matters of procedure, he asked whether it was the intention of the Secretariat to send a revised draft Guide to Commission members for comment.

76. The CHAIRMAN said his impression was that the Commission had moved away from that idea and that it wanted everything to be decided at the present session subject to updating by the Secretariat. However, that would not prevent any delegation from making suggestions later for reflection in the report.

77. Mr. WALLACE (United States of America) said he was not sure that should be the consensus in the Commission. While believing that the Model Law should be adopted in its final form before the end of the present session, he also believed that only a properly revised Guide to Enactment would enhance the impact of the Commission's work. There must be sufficient time for deliberation, comment and reflection.

78. Mr. KOMAROV (Russian Federation) said that the greatest problem undoubtedly related to new text concerning articles amended or introduced during the present session, and he wondered whether Commission members would have an opportunity to look at that new text before they left Vienna.

79. Mr. HERRMANN (Secretary of the Commission) replied that the Secretariat could produce new text very quickly if requested to do so, but it would prefer not to as it wanted to do a proper job.

The meeting rose at 5 p.m.